(2)

Supreme Court, U.S.
FILED
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No. 99-1236

IN THE

Supreme Court of the United States

HYDRECLAIM CORPORATION,

Petitioner,

v.

PROCESS CONTROL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons in support of its petition for a writ of certiorari where the Court of Appeals for the Federal Circuit properly exercised its *de novo* review of the construction of the claims of Petitioner's patent-in-suit pursuant to *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996)?

2. Whether the Court of Appeals for the Federal Circuit properly exercised its discretion in holding the '943 patent claims invalid in view of Petitioner's judicial admission that the claims as construed by the Federal Circuit make no sense and, thus, define an inoperable invention in violation of 35 U.S.C. § 112, 1st paragraph?

PARTIES TO THE PROCEEDING AND STATEMENT OF INTEREST UNDER RULE 29.6

The caption of the case contains all of the parties to this proceeding. Respondent, Process Control Corporation, has no parent companies, and there is no publicly owned company owning 10% or more of its stock.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Process Control Corporation, hereby respectfully submits its opposition to, and reasons for denying, Petitioner, HydReclaim Corporation's, Petition for a writ of certiorari.

CITATION OF OPINIONS BELOW

The opinions and orders of the Court of Appeals for the Federal Circuit and the District Court for the Northern District of Georgia that are the subject of the Petition are properly presented in the Petition and are found in the Appendix at the back of the Petition. A citation to "A1" below, for example, is intended to refer to page 1 of that Appendix.

JURISDICTIONAL STATEMENT

The jurisdictional requisites for filing the Petition are adequately stated in the Petition, namely 28 U.S.C. § 1254(1); however, there is no valid reason for review as provided by Supreme Court Rule 10 (a) or (c), as shown below.

STATUTES AND RULE INVOLVED

This case involves 35 U.S.C. § 112, 1st and 2nd paragraphs, that state in relevant part:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly

> connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.
>
> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

35 U.S.C. § 112.

Also involved is Supreme Court Rule 10, that provides:

> Rule 10. Considerations Governing Review on Certiorari
>
> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

COUNTERSTATEMENT OF THE CASE

This case, as it now stands before this Court, involves the issue of how claims in a patent are construed or interpreted. Respondent Process Control brought this action seeking declaratory judgment that the claims of Petitioner HydReclaim's U.S. Patent No. 5,148,943 ("the '943 patent") are not infringed by Process Control and/or are invalid, and are unenforceable. The District Court rendered judgment in favor of HydReclaim finding the claims of the patent infringed and not proved invalid. The Federal Circuit Court of Appeals reversed-in-part and vacated-in-part the District Court's judgment, holding the claims of the patent invalid, and thus vacating the District Court's finding of infringement. The Decision of the Federal Circuit focuses on the issue of the construction or interpretation of the claims of the '943 patent, as does the Petition. Accordingly, the discussion herein will be limited to that issue. A copy of the '943 patent is found in the separate Patent Document Appendix to the Petition. Citations to the '943 patent will be to that Appendix.

This dispute involves continuous gravimetric blenders used by the plastics industry. Such blenders are designed to meter multiple material ingredients (typically in the form of resin pellets) from a number of weighed hoppers in controlled ratios by weight (i.e., gravimetrically) and to deliver the ingredients as a blended mixture to a common hopper. The blend is then available from the common hopper to a material processing machine, such as an extruder, for further processing. There are two main objectives for these blenders. One is to maintain the desired ratio of the ingredients by weight so that the final blend of the ingredients has the desired proportion of each ingredient. Two is to satisfy the needs of the processing machine (extruder) by controlling the total rate at which the blend is produced (the "blender rate") so that neither too much, nor too little, is produced. The '943 patent is directed to this type of a machine. A reproduction of a line drawing of the blender to which the '943 patent is directed is found in the Decision of the Federal Circuit, A4.

The '943 patent has a number of claims, but only Claims 1, 3-7, 11, 13, and 14 are asserted as infringed. A30. Of these, Claims 1, 4, 7 and 14 are the type of claims referred to as independent claims, meaning they stand on their own independently of, and without reference to, any other claim or claims. A23-24. Claims 1-6 are directed to a "*method* of metering" different "material ingredients for discharge to" a material processing (extrusion) machine. For all intents and purposes herein, Claims 1 and 4 define the same invention. Claims 7-14 are directed to an "*apparatus* for metering" different "material ingredients for discharge to" a material processing machine. For all intents and purposes herein, Claims 7 and 14 define the same invention. A7.

The particular issue resolved by the Federal Circuit, and now before this Court, is the construction or interpretation to be given these claims. The method defined by Claim 1 includes the limitation: *"discharging material from said common hopper to said processing machine at a discharge rate"* (Column 8, lines 8-9). This limitation is referred to as clause [b] in Claim 1 by the Federal Circuit. A7. Both parties concur that the "discharge rate" in this limitation means the rate of flow of material from the common hopper to the processing machine.

Claim 1 also includes the subsequent limitation (referred to by the Federal Circuit as clause [d]):

> determining the material processing rate of the processing machine from [1] the sum of the material discharge rates of the ingredients to the common hopper and [2] *the discharge rate of the material from the common hopper to the processing machine.*

(Column 8, lines 15-16) (emphasis added).

It is this subsequent limitation that is at the crux of the dispute. Respondent, Process Control, contends, and the Federal Circuit held, that this second occurrence of the term "discharge rate" must have the same meaning as the first occurrence of the term, appearing in the prior limitation of clause [b] of the same claim. Both occurrences use the same term "discharge rate" and are identically specified with the same source ("*from* the common hopper") and the same destination ("*to* the processing machine") for the material being discharged.

HydReclaim contends that these two identically specified "discharge rates" do not have the same meaning. HydReclaim alleges the '943 patent specification redefines the second occurrence, but not the first, of the term "discharge rate" to mean "the change of weight in the common hopper", superseding the antecedent definition of the term provided in clause [b] of the claim. HydReclaim's construction creates two different meanings within the same claim for the same identically specified "discharge rate". HydReclaim's construction is necessary for it to make out its case of infringement. HydReclaim did not present a case of infringement under Process Control's construction of the patent's claims.

Claim 7 (and similarly Claim 14) defines an apparatus including the limitations:

> second weighing means operably associated with the common hopper for detecting *a change in weight* of the ingredients therein . . . , and
> a master computer control unit . . . being operative to determine the material processing rate of said machine based on [1] the sum of said material discharge rates from the metering devices to the common hopper plus or minus [2] *the discharge rate* of the ingredients *from* the common hopper *to* the processing machine . . .

(Emphasis added).

HydReclaim contends that the "discharge rate of the ingredients from the common hopper to the processing machine" in Claims 7 and 14 should, likewise, mean "the change of weight of the common hopper", contrary to its

ordinary meaning. HydReclaim's construction would give the phrase "discharge rate" the same meaning as the phrase "a change in weight" used earlier in Claims 7 and 14. HydReclaim proposes a construction that is summarized in the first of the charts of Claims 1 and 7 found in Appendix A hereto.

Process Control contends that there must be a uniform definition of the identically specified term "discharge rate" within the patent's claims. Otherwise, the claims are ambiguous and indefinite in violation of 35 U.S.C. § 112, 2nd paragraph. This applies not only to Claim 1, but to all of the claims. All of the claims contain the limitation of clause [d]. A7.

The Federal Circuit reviewed the patent claim construction issue *de novo* pursuant to *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). A6. It rejected HydReclaim's proposed claim construction and agreed with Process Control's proposed claim construction. A11. The Federal Circuit specifically found that Claim 1, as written by the patentee HydReclaim, is susceptible to only one meaning and that the two instances of the term "discharge rate" appearing in Claim 1 must have the same meaning, as well as those instances in all of the other claims. Its conclusion necessarily results from the identical language associated with the term in all instances, namely "*from* the common hopper *to* the material processing machine." The Federal Circuit's construction avoids the lack of antecedent basis problem presented by HydReclaim's construction that renders the claim indefinite in violation of 35 U.S.C. § 112, 2nd paragraph. The Federal Circuit went on to find that the portions of the patent's specification relied upon by HydReclaim and the District Court "do not so clearly redefine

'the discharge rate' in the second appearance in the claim as to put a reasonable competitor or one reasonably skilled in the art on notice that the patentee intended to so redefine that claim term." A11-12. It then stated:

> As a result of our claim construction, clause [d] does not make "sense" *as HydReclaim itself realizes and concedes*. What HydReclaim fails to realize is that such a nonsensical result does not require the court to redraft the claims of the '943 patent. Rather, where as here, claims are susceptible to only one reasonable interpretation and that interpretation results in a nonsensical construction of the claim as a whole, the claim must be invalidated, thus preventing unduly burdening competitors who must determine the scope of the claimed invention based on an erroneously drafted claim.

(Emphasis added) A13-14.

HydReclaim subsequently filed a Petition for Rehearing before the Federal Circuit that was denied. A65. HydReclaim did not contest the Federal Circuit's construction of Claim 1. Instead, it contested only the construction of Claims 7 and 14 based on the argument that the term "discharge rate" appears only once in those claims, and so the term is not bound to the same rules of construction that the Federal Circuit used for Claims 1 and 4. In particular, it argued that since the term appears only once in these claims, its construction is not constrained by the lack of antecedent problem presented in the construction of Claims 1 and 4. It also contested the Federal Circuit's authority for holding the '943 patent claims invalid.

Process Control opposed the Petition for Rehearing pointing out that HydReclaim's new construction results in the identically specified "discharge rate" term appearing both in Claims 1 and 4 as having a different meaning than in Claims 7 and 14. It would also result in the term "discharge rate" appearing in Claims 7 and 14 having the same meaning as a different term, "change in weight," appearing earlier in Claims 7 and 14. HydReclaim's new construction argument is summarized in the second of the charts of Claims 1 and 7 appearing in Appendix B hereto.

This Petition followed.

ARGUMENT AND REASONS FOR DENYING THE WRIT

Petitioner, HydReclaim, presents no compelling reason why its Petition should be granted. This case presents neither a conflict in the law, nor a need for clarification of the law. There is no issue as to what portions of a patent a court may or must consider in construing the claims of the patent, as HydReclaim asserts. Simply put, HydReclaim seeks to have this Court exercise *de novo* review of the Federal Circuit's *de novo* review of the construction of the claims of the '943 patent-in-suit.

The Federal Circuit correctly construed the claims of the '943 patent-in-suit in accordance with this Court's holding in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), the precedent of the Federal Circuit, and the clear and unambiguous dictates of patent law. It held that the particular limitation, i.e., phrase of the claims, involving the term "discharge rate" was unambiguous and subject to only one reasonable interpretation. A11, 13. It so held after

considering not only the plain meaning of the words of the claims, but also after considering the specification (referred to as the "written description" in its Decision). A7-9, 11-13. The Federal Circuit's careful and detailed consideration is even acknowledged by HydReclaim at pages 8-9 of its Petition. Such construction is merely an application of the rule of law in *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979-980 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996).

Thus, the Petition's basic premise, namely that the Federal Circuit either ignored or made no reference to the patent's specification in construing the patent's claims, is without foundation and contrary to the Decision of the Federal Circuit. The Petition, therefore, may be denied on this point alone.

Moreover, although a patentee is free to be his own lexicographer, any special definition ascribed to a term in a claim, to the extent it differs from the term's ordinary meaning, must be clearly defined in the patent specification. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979-980 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996). The Federal Circuit found, contrary to HydReclaim's argument, that the specification of the '943 patent did not "so clearly redefine 'the discharge rate' in clause [d] so as to put a reasonable competitor or one reasonably skilled in the art on notice that the patentee intended to so redefine that claim term" from that presented by the plain meaning of the words of the claims. A12. Nowhere does the specification explain that the term "discharge rate" is to have one meaning in one instance and a different meaning in another instance in the claims.

Notably, Petitioner HydReclaim never identifies any particular passage in the patent's specification that was ignored or that clearly redefines the meaning of the second instance of the "discharge rate" term appearing in clause [d], or how the Federal Circuit's holding would have been affected had such unidentified passage not been ignored. Instead, HydReclaim confuses the distinction between the plain meaning of words and phrases of the patent's claims with what meaning is to be attributed to such plain meaning. HydReclaim leaves for one's imagination exactly what error is being claimed and what relief truly is being sought. This presents further reasons for denial of the Petition.

A review of the patent's specification shows the correctness of the Federal Circuit's construction of the claims. Clause [d] of Claim 1, and the corresponding clauses in Claims 4, 7, and 14, as construed by the Federal Circuit, find support in several locations in the patent specification. *See, e.g.*, Column 3, lines 45-51; column 4, lines 3-8; column 6, lines 1-6; and, column 7, lines 18-23.

Adopting HydReclaim's construction of the claims requires adopting the following errors of law:

1. the identically defined term "discharge rate" can have two different meanings in the '943 patent claims, and even within the same claim, violating the principle that the same terms appearing in the claims of a patent are to be interpreted consistently, *Southwall Technologies, Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1579 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 987, (citing *Fonar Corp. v. Johnson & Johnson*, 821 F.2d 627, 632 (Fed. Cir. 1987), *cert. denied,* 484 U.S. 1027 (1988));

2. two differently worded terms in a claim with different units, namely "change in weight" and "the discharge rate" in Claims 7 and 14, can have the same meaning, violating the principle that use of different terms in a single claim indicates that the terms are not synonymous, *Ethicon Endo-Surgery v. United States Surgical Corp.*, 93 F.3d 1572, 1579 (Fed. Cir. 1996);

3. the qualifying clause to the term "the discharge rate," namely the quite specific and unambiguous clause "from the common hopper to the processing machine [extrusion machine]" can be ignored, violating the principle that each and every limitation in a claim is material and essential and should be given meaning, *Lemelson v. United States*, 752 F.2d 1538, 1551 (Fed. Cir. 1985);

4. the claims can be construed so as to eliminate the antecedent basis for the second instance of the term "the discharge rate," rendering the claims indefinite in violation of 35 U.S.C. § 112, 1st and 2nd paragraphs; and

5. a patent specification can be used to redefine one, but not both, instances of the identically specified "discharge rate" term in the same claim, also rendering the claims indefinite in violation of 35 U.S.C. § 112, 1st and 2nd paragraphs.

Furthermore, assuming *arguendo* "the discharge rate" term is redefined in the patent's specification, the specification cannot supercede the express definition of a term in the claims themselves. To allow such a redefinition, as proposed by HydReclaim, would allow a patentee to obtain issuance of a patent based on one meaning of its patent claims and then seek to enforce an infringement claim based on a

different meaning of its patent claims, thereby blindsiding its competitors. To allow a patentee to do so eliminates the long standing policy that patent claims should provide notice to the public of what is covered by the patent. In the famous nose of wax analogy, this Court in *White v. Dunbar*, 119 U.S. 47, 51-52 (1886), stated:

> Some persons seem to suppose that a claim in a patent is like a nose of wax, which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. . . . The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms. This has been so often expressed in the opinions of this court that it is unnecessary to pursue the subject further.

Such is the case here.

Lastly, the Federal Circuit's holding that the patent's claims are invalid is a natural and logical conclusion, based upon HydReclaim's own judicial admission that, under the construction held by the Federal Circuit, the claims were nonsensical. HydReclaim should not now be heard to complain about the natural consequence of its own calculated argument and admission. HydReclaim cannot claim to have been denied due process or an opportunity to address the issue where HydReclaim itself made the argument!

As the Federal Circuit appropriately noted, the parties' agreement that Process Control's claim construction, and later the Federal Circuit's claim construction, produces a nonsensical, and impossible to meet, claim, raised the issue in front of the Federal Circuit of utility and enablement under 35 U.S.C. §§ 101 and 112, 1st paragraph.

Even in the face of the clear holding by the Federal Circuit that such issue was before it, while it is true that ordinarily a court will not consider an issue not raised below, an appellate court will consider an issue not presented below where: (1) the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) the proper resolution is beyond any doubt; (3) the appellant had no opportunity to raise the objection at the district court level; (4) the issue presents "significant questions of general impact or of great public concern"; *or* (5) the interest of substantial justice is at stake. *L. E. A. Dynatech, Inc. v. Allina,* 49 F.3d 1527, 1531 (Fed. Cir. 1995).

In this case, HydReclaim's admission that the properly construed claims are "nonsense" leaves the proper resolution of invalidity beyond any doubt. Moreover, the issue of invalidity is an issue that presents "significant questions of general impact or of great public concern." This Court has identified a strong public interest in the finality of judgments in patent litigation, stating between the questions of infringement and validity, validity has the greater public importance. *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 100 (1993), and has emphasized the importance to the public at large of resolving questions of patent invalidity. *Blonder-Tongue Lab., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313 (1971).

CONCLUSION

Wherefore, for all of the above and foregoing reasons, Respondent Process Control prays that this Court deny HydReclaim's Petition for a writ of certiorari as the Federal Circuit's Decision is merely a restatement and fact-specific application of the law concerning the construction of patent claims as established in *Markman v. Westview Instruments, Inc.*

Respectfully submitted,

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APPENDIX

APPENDIX A-1A

U.S. PATENT NO. 5,148,943

HYDRECLAIM'S CLAIM INTERPRETATION PRESENTED TO THE DISTRICT COURT

I claim:

1. A method of metering different material ingredients for discharge to a material processing machine, comprising:

delivering to a common hopper a plurality of individual material ingredients at controllable individual material discharge rates,

discharging material from said common hopper to said processing machine at a discharge rate,

determining loss of weight of material in said hopper due to discharge of material therefrom,

determining the material processing rate of the processing machine from the sum of the material discharge rates of the ingredients to the common hopper and the discharge rate of the material from the common hopper to the processing machine, and

controlling the material discharge rates of the ingredients to the common hopper in response to said determined material processing rate as needed to maintain a preset recipe of said blended ingredients at said determined material processing rate.

Same term, different meaning

7. Apparatus for metering different material ingredients for discharge to a material processing machine, comprising:

a plurality of metering devices for providing a controlled discharge rate of individual material ingredients, each of said metering devices comprising an individual material hopper for containing the material ingredient to be metered, first weighing means operably associated with each individual material hopper for detecting loss in weight of the material ingredient therein, a driven discharge device operably associated with each material hopper for discharging the material ingredient therefrom, and computer control means coupled to the weighing device for determining a material discharge rate and operably associated with the driven discharge device of each hopper for controlling the material discharge rate thereof,

a common hopper for receiving the ingredients discharged by the metering devices,

second weighing means operably associated with the common hopper for detecting a change in weight of the ingredients therein during discharge from the common hopper to the material processing machine, and

a master computer control unit coupled to said individual computer control devices and to said second weighing means, said master computer control device being operative to determine the material processing rate of said machine based on the sum of said material discharge rates from the metering devices to the common hopper plus or minus the discharge rate of the ingredients from the common hopper to the processing machine and to control the material discharge rates of the metering devices as needed to maintain a preset recipe of said ingredients at said determined material processing rate. *Columns 8-9*

Different terms, same meaning

APPENDIX B-2A

U.S. PATENT NO. 5,148,943

HYDRECLAIM'S CLAIM INTERPRETATION IN ITS PETITION FOR REHEARING TO THE FEDERAL CIRCUIT

I claim:

1. A method of metering different material ingredients for discharge to a material processing machine, comprising:

delivering to a common hopper a plurality of individual material ingredients at controllable individual material discharge rates,

discharging material from said common hopper to said processing machine at a discharge rate,

determining loss of weight of material in said hopper due to discharge of material therefrom,

determining the material processing rate of the processing machine from the sum of the material discharge rates of the ingredients to the common hopper and the discharge rate of the material from the common hopper to the processing machine, and

controlling the material discharge rates of the ingredients to the common hopper in response to said determined material processing rate as needed to maintain a preset recipe of said blended ingredients at said determined material processing rate.

Same limitation, different meaning

7. Apparatus for metering different material ingredients for discharge to a material processing machine, comprising:

a plurality of metering devices for providing a controlled discharge rate of individual material ingredients, each of said metering devices comprising an individual material hopper for containing the material ingredient to be metered, first weighing means operably associated with each individual material hopper for detecting loss in weight of the material ingredient therein, a driven discharge device operably associated with each material hopper for discharging the material ingredient therefrom, and computer control means coupled to the weighing device for determining a material discharge rate and operably associated with the driven discharge device of each hopper for controlling the material discharge rate thereof,

a common hopper for receiving the ingredients discharged by the metering devices,

second weighing means operably associated with the common hopper for detecting a change in weight of the ingredients therein during discharge from the common hopper to the material processing machine, and

a master computer control unit coupled to said individual computer control devices and to said second weighing means, said master computer control device being operative to determine the material processing rate of said machine based on the sum of said material discharge rates from the metering devices to the common hopper plus or minus the discharge rate of the ingredients from the common hopper to the processing machine and to control the material discharge rates of the metering devices as needed to maintain a preset recipe of said ingredients at said determined material processing rate. *Columns 8-9*

Different terms, same meaning